Re Lua Kin Suai & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUIT NO S2-24-158 OF 1998
KAMALANATHAN RATNAM J
26 OCTOBER 1998

Succession *— Administration — Application to transfer land to applicant-father — Argument that applicant is guardian for infant-beneficiaries and therefore is a trustee holding property under implied trust for infants — Court to be satisfied that application is made for benefit of the infants — Whether court can accept that trust was intended — Whether guardian ad litem could consent on behalf of infants — Whether guardian must state why transfer would benefit infants — Distribution Act 1958 s 6(1)(e)*

The first administrator — the husband of the deceased — and the second administrator — the guardian ad litem of the infant children of the deceased — applied to have portions of the assets to be transferred to the first administrator. No reason was given for seeking the transfer. One of the issues was whether the guardian ad litem, who consented to the application on behalf of the infants, could give such a consent in the light of the provisions of s 6(1)(e) of the Distribution Act 1958. It was argued that the first administrator, being the father, was also a guardian for the infants and as such was a trustee holding the property under an implied trust for the infants.

Held, dismissing the application:

(1) Before the court considers any application to divest the interest of beneficiaries, the court must be satisfied that such an application is being made for the benefit of the infants. The consent of the guardian ad litem must not be taken to be a mere rubber stamp of approval. Even the guardian ad litem must state why in her view such a transfer to the husband-beneficiary would benefit the infants. In this case, no facts had been presented to enable the court to properly exercise its discretion in favour of the applicants (see pp 261H–262C).

(2) The application sought to transfer the properties to the father in his personal capacity. In the absence of any averments in the affidavit that a trust deed had been created and the conveyance to the father was sought on the basis that he was to hold the shares of the infants in trust for their benefit, the court could not, on the application as it had been made, accept that a trust was intended (see p 262F–G).

Obiter:

A guardian ad litem is a person appointed to defend an action or other proceedings on behalf of an infant or person under disability. There is no question of any infant having to defend any action in this case.

A Also, in this case, since there were already two administrators, the appointment of a guardian ad litem — and more so since the same guardian ad litem was also one of the administrators — is superfluous and redundant (see pp 262G, 263A–B).

B **[Bahasa Malaysia summary**

Pentadbir pertama — suami si mati — dan pentadbir kedua — penjaga ad litem anak-anak kecil si mati — telah membuat permohonan supaya bahagian aset-aset dipindahkan kepada pentadbir pertama. Tiada sebab telah diberikan untuk permintaan pindahan. Salah satu daripada isu
C adalah sama ada penjaga ad litem yang bersetuju kepada permohonan bagi pihak budak-budak tersebut, boleh memberikan kebenaran sedemikian memandangkan peruntukan s 6(1)(e) Akta Pembahagian 1958. Adalah dihujahkan memandangkan pentadbir pertama adalah ayah, beliau jugalah penjaga budak-budak tersebut dan oleh yang demikian adalah pemegang amanah yang memegang harta di bawah
D amanah tersirat untuk budak-budak tersebut.

Diputuskan, menolak permohonan:

(1) Sebelum mahkamah menimbang sebarang permohonan untuk melucutkan kepentingan benefisiari, mahkamah mestilah
E berpuas hati bahawa permohonan sedemikian dibuat untuk manfaat budak-budak tersebut. Kebenaran penjaga ad litem mestilah tidak diambil sebagai sekadar tanda kelulusan. Malah penjaga ad litem mesti menyatakan mengapa dalam pandangannya pindahan kepada suami-benefisiari akan memanfaatkan budak-budak tersebut. Dalam kes ini, tiada fakta telah dikemukakan bagi
F membolehkan mahkamah melaksanakan budi bicaranya dengan sewajarnya memihak kepada pemohon-pemohon (lihat ms 261H–262C).

(2) Permohonan tersebut bertujuan memindah harta kepada ayah dalam keupayaan peribadi. Dalam ketiadaan apa-apa penegasan
G dalam afidavit bahawa suartikatan amanah telah diwujudkan dan pemindahhakan kepada si ayah diminta atas dasar bahawa beliau hendaklah memegang bahagian-bahagaian budak-budak tersebut dalam amanah untuk manfaat mereka, mahkamah tidak boleh, atas permohonan sebagaimana yang dibuat, menerima bahawa suatu amanah diniatkan (lihat ms 262F–G).

H

Obiter:

Penjaga ad litem adalah orang yang dilantik untuk membela suatu tindakan atau prosiding lain bagi pihak seorang budak atau orang di bawah ketidakupayaan. Tiada persoalan tentang mana-mana budak
I yang perlu membela apa-apa tindakan dalam kes ini. Lagipun, dalam kes ini, memandangkan sudah pun terdapat dua orang pentadbir, perlantikan seorang penjaga ad litem — dan lebih-lebih lagi

memandangkan penjaga ad litem yang sama juga merupakan seorang pentadbir — adalah berlebihan dan tidak diperlukan (lihat ms 262G, 263A-B).]

Notes

For cases on administration, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1659–2195.

Case referred to

Yap Yoke Luan & Ors v Ong Wee Tok & Ors [1984] 1 MLJ 23 (refd)

Legislation referred to

Distribution Act 1958 s 6(1)(e)
Guardianship of Infants Act 1961 s 4(3)
Probate and Administration Act 1959 s 60(4)

YS Lim (*Tee Tan & Partners*) for the applicants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

One Law Lew Geok (f) died on 5 January 1997. She had assets. She left behind her husband, Lua Kin Suai, and four infant children. Letters of administration in respect of her estate were granted on 18 July 1997 and extracted on 15 December 1997. By an order of court dated 18 July 1997, one Law Ai Tai (f), the deceased's sister, was appointed the guardian ad litem of the infant children. The administrators are the husband, Lau Kin Suai and Law Ai Tai. The declared assets of the deceased are as follows:

(1) Kesemua $^1/_6$ bahagian hartanah yang dipegang di bawah CT 25450, Lot 2050, Mukim Beranang, Daerah Ulu Langat	— RM100,000.00
(2) Kesemua hartanah yang dipegang di bawah HS (M) 15306, PT 16933, Mukim Klang, Negeri Selangor	— RM 55,000.00
(3) Akaun Simpanan Tetap di Bank Simpanan Nasional (Akaun No 1-036645-20)	— RM 5, 088.75
(4) Akaun Simpanan di Bank Simpanan Nasional (Akaun No 5-4343905-6)	— RM 509.90
(5) Akaun Simpanan di Bank Simpanan Nasional (Akaun No 5-4343907-2)	— RM 627.57
(6) Akaun Simpanan di Bank Simpanan Nasional (Akaun No 5-8715208-1)	— RM 138.79
	RM 161,364.71

A *The application*

Both the administrators then applied to have assets Nos 1 and 2 to be transferred to the husband-beneficiary.

Case for the applicants

B Although this application was by way of ex parte, I had directed Mr YS Lim of counsel for the applicants to address me as to the propriety of this application. I questioned whether the guardian ad litem, who had in fact consented to this application on behalf of the infants, could give such a consent in the light of the provisions of the Distribution Act 1958, namely

C s 6(1)(e) which reads:

> 6 Succession to intestate estates
>
> (1) After the commencement of this Act, if any person shall die intestate as to any property to which he is beneficially entitled for an interest which does not cease on his death, such property or the proceeds thereof after
>
> D payment thereout of the expenses of due administration shall, subject to the provisions of section 4, be distributed in the manner or be held on the trusts mentioned in this section, namely —
>
> (e) if an intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds; ... .

E I have perused the affidavit filed by the administrators in support of this application very carefully and I note that the applicants have given no reason at all for seeking the said transfer. The only fact mentioned is that the guardian ad litem has no objections.

Mr Lim relied on s 60(4) of the Probate and Administration Act 1959

F which reads as follows:

> (4) An administrator may not, without the previous permission of the Court —
>
> (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being
>
> G vested in him; or
>
> (b) lease any such property for a term exceeding five years.

I do not think that the Act relied on by the applicants is helpful. Section 60(4) of the Probate and Administration Act 1959 merely provides that before an administrator could mortgage, charge, transfer by sale, gift or

H exchange any immovable property or lease such property for a term exceeding five years, he must get the court's consent.

Before the court considers any application to divest the interest of beneficiaries, the court must be satisfied that such an application is being made for the benefit of the infants. In this case, the court has not been told the reason for this request to transfer the two properties to the father. It may

I be that for the better administration or management of the trust properties, it would be beneficial to transfer the said properties to the husband-beneficiary. It is my judgment that the consent of the guardian ad litem

must not be taken to be a mere rubber stamp of approval. The question arises whether this court should be concerned with the propriety or otherwise of this application so long as the guardian ad litem has given her consent. It is my judgment that even the guardian ad litem must state why in her view such a transfer to the husband-beneficiary would benefit the infants.

In fact in *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 (FC), Syed Agil Barakbah FJ said at p 25E–F:

> ... The duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion, the court will have to look into the facts and surrounding circumstances of the case, ie whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price.

As I had said earlier, no facts have been presented to me, to enable me to properly exercise my discretion in favour of the applicants.

In law, pursuant to the Distribution Act 1958, the surviving spouse, namely the husband in this case, is only entitled to one third of the estate and the infant children no doubt in equal shares the remaining two-thirds. Neither the husband-beneficiary nor the administrator has explained the benefit to be accrued to the infants as a result of this transfer.

Finally, Mr Lim argued that the first administrator being the father, is also a guardian for the infants. A guardian, holding the property of the infant, is a trustee holding the property under an implied trust for the infants. Relying on the Guardianship of Infants Act 1961, learned counsel argued that an implied trust was created as soon as the guardian comes into possession of property belonging to an infant.

To my mind, Mr Lim's submission is clearly in conflict with the application which seeks a transfer of the said properties to the father in his personal capacity. It would have been very clear to the court if a trust deed had been created and the conveyance to the father was sought on the basis that he was to hold the shares of the infants in trust for their benefit. In the absence of any averments in the affidavit, I cannot, on the application as it has been made, accept that a trust was intended.

In any case, I am at a loss as to why a guardian ad litem has been appointed at all in this case. The *Concise Law Dictionary* (Latin) (5th Ed) defines a guardian ad litem as a person appointed to defend an action or other proceedings on behalf of an infant or person under disability. There is no question of any infant having to defend any action in this case. I take the word 'proceedings' to mean any action whereby an infant is called upon to act, to protect himself in respect of any matter. In fact, s 4(3) of the Probate and Administration Act 1959 which reads:

> If there is only one personal representative (not being a trust corporation) then, during the minority of a beneficiary or the subsistence of a life interest, and until the estate is fully administered, the Court may on the application of any person interested or of the guardian, committee or receiver of any such

A person, or of its own motion, appoint in accordance with rules of court one or more personal representatives in addition to the original personal representative.

clearly allows for the appointment of two personal representatives where an infant is involved. In this case, since there were already two administrators, the appointment of a guardian ad litem — and more so since the same guardian ad litem was also one of the administrators — is in my judgment superfluous and redundant.

In the circumstances, as the application now stands, it stands dismissed.

Application dismissed.

Reported by Loo Lai Mee